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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. [redacted] 121

DOROTHY K. KNOST, *Petitioner*,

v.

DONALD A. MACMILLAN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

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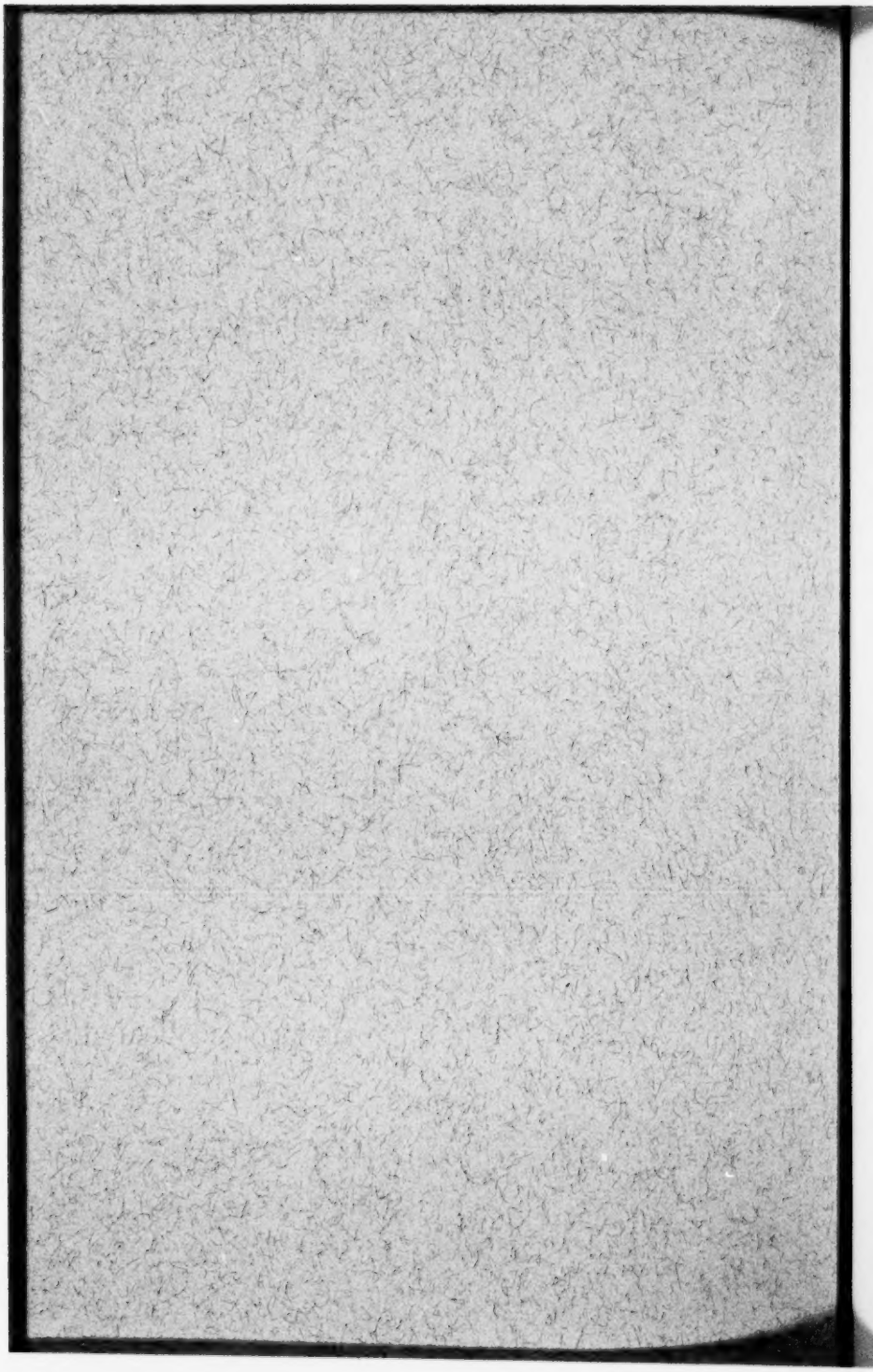

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To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, the appellee below, prays a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above cause on the 30th day of March, 1942 (R. 530), reversing the judgment of the District Court of the United States for the District of Columbia in refusing to set aside the verdict of the jury.

OPINIONS BELOW.

The Judge of the District Court of the United States for the District of Columbia rendered an opinion refusing to set aside the verdict of the jury and to enter an order for the defendant (appellant below) *non obstante veredicto.* This opinion is set forth in the record at p. 516. The opinion of the United States Court of Appeals for the District of Columbia is found in 126 F. 2d. 235.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on the 30th day of March, 1942 (R. 530).

The jurisdiction of this court is invoked under Section 240A of the Judicial Code, as amended by the Act of February 13, 1935, in 28 U. S. C., Section 347.

QUESTIONS PRESENTED.

This case involves two questions. First, whether the evidence supported the verdict of the jury in finding that the will of the testatrix was obtained by undue influence. Second, whether two justices of the United States Court of Appeals for the District of Columbia (the Chief Justice dissenting) out of the six justices composing the court, are empowered to reverse the judgment of the United States District Court for the District of Columbia refusing to set aside the verdict finding that the will of the testatrix was procured by undue influence. Third, whether even if a minority of the Appellate Court is empowered to reverse the judgment of the court below refusing to set aside the verdict of the jury, finding a will obtained by undue influence, it is not arbitrary and an abuse of judicial discretion to deny the petition for re-hearing and re-argument before the full court where the two justices uniting in the opinion overturning the verdict of the jury (the Chief Justice dis-

senting) declared: "Appellant's conduct may arouse distaste in reasonable men. Reasonable men measuring his conduct by their individual standards may even call it improper. The jury in effect have done so."

REASONS FOR GRANTING THE WRIT.

A writ of certiorari should be granted under subdivision 5(b) of rule 38 of this court for the following reasons:

1. The two judges of the United States Court of Appeals for the District of Columbia in overruling the verdict of the jury of twelve men, set themselves up as a jury of the facts superior to the jury which heard the evidence and saw the witnesses, and has thus deprived the petitioner of the right of trial by jury on an issue of fact in violation of the Seventh Amendment of the Constitution of the United States.

2. The decision of the Appellate Court is in conflict with decisions of this court that a motion to set aside a verdict "could be granted only when all reasonable men draw but one conclusion from it and that utterly opposed to the plaintiff's right to recover."

3. Two judges of the United States District Court for the District of Columbia who heard the evidence and saw the witnesses, refused to direct verdicts for the respondent. The Chief Justice of the United States Court of Appeals was of opinion that there was evidence to support the verdict of the jury. The petitioner filed a petition before the Court of Appeals asking for a rehearing and a re-argument before the full court. This was denied.

Thus two judges of the Appellate Court who did not hear the evidence or see the witnesses have set aside the verdict of the jury where three other judges thought the evidence supported the verdict. It is in the public interest to have an authoritative determination of (a) whether or not two judges of a court composed of six judges are empowered under the law to set aside the verdict of the jury and the

action of the court below, and (b) whether or not it is not arbitrary and a violation of judicial discretion to refuse a re-hearing and re-argument under such circumstances.

STATEMENT OF THE CASE.

The District Court of the United States for the District of Columbia, upon a verdict of the jury finding that the will of Nellie E. Cameron was obtained by undue influence, entered an order denying its probate. The testatrix died while visiting in California. She had lived at 440 Park Road, Washington, D. C. for more than 23 years prior to her death (R. 48). The testatrix drove to California alone with the respondent, McMillan, in five days arriving there October 27, 1937. The will in question was executed within a day or two after her arrival in California. She left her home with the telephone connected, the oil tanks filled, ready for occupancy under the care of her neighbor (R. 50, 164). She had two lots in Cedar Hill Cemetery in the District of Columbia where she expected to be buried (R. 50). Her estate amounted to approximately $29,000 (R. 210). She was taken ill in December 1937 and died February 3, 1938. The respondent, McMillan, on the day after her death and the day before her burial, the sole beneficiary of her will, filed it for probate in California and sought letters testamentary falsely swearing that she was domiciled in California (R. 199, 200) although the will itself gave her domicile at 440 Park Road, Washington, D. C. (R. 1).

The testatrix was more than 76 years old when she died (R. 206). The sole beneficiary was 41 and was no relation to her but was the grandnephew of her husband who died in 1928 and whose estate she inherited (R. 209).

Trial was had in the District of Columbia upon the issue of the testatrix's domicile and a jury rendered a verdict October 21, 1938 that she died domiciled in the District of Columbia (R. 4). The petitioner filed a caveat and two trials were had before the District Court on the issue of undue influence. In the first trial before Mr. Justice

Adkins, the jury disagreed, McMillan, the respondent, filed a petition for special appeal. This petition was denied. In that trial McMillan, the caveatee, moved for a directed verdict at the close of the caveator's case. This was overruled. The motion for a directed verdict was renewed at the conclusion of all the testimony and overruled. After the jury did not agree the caveatee filed a motion for a judgment *non obstante veredicto.* This motion was denied.

In the subsequent trial, motion for directed verdict, for judgments *non obstante veredicto* or for a new trial were filed and denied. Upon an appeal from the judgment of the court refusing to interfere with the verdict of the jury and denying probate of the will, appeal was taken to the United States Court of Appeals for the District of Columbia and the judgment of the lower court was reversed.

Out of the tremendous record consisting of 526 printed pages we will attempt to point out the most salient facts.

Testatrix first will was made on January 28, 1931, leaving her property, with the exception of small individual bequests, to her brother, whom she raised and who in turn had supported her until her marriage, for his life, and at his death to her niece, the appellee, Dorothy Knost (R 75). Dorothy Knost had spent many summers with her for many years and was the peculiar object of her affections (R. 40, 47, 127, 165). In 1933, her brother having died, the testatrix dictated a letter in her lawyer's office directed to her niece Dorothy Knost, expressing the wish that she, Dorothy Knost, should make certain disposition of the estate left her (R. 103). The directions of this letter were followed subsequently on October 3, 1935, by the execution of another will which was drafted by her attorney, Walter B. Guy. Donald MacMillan, according to the testimony of the neighbors of Mrs. Cameron, appeared for the first time in Washington in that neighborhood in October, 1935.

He was of no blood relation to Mrs. Cameron but was a grand nephew of Mrs. Cameron's husband, and is now approximately 41 years of age. At the time he first ap-

peared in 1935 Mrs. Cameron was 73 years of age and he was 37. By the terms of her will of October 3, 1935, Donald MacMillan, was for the first time mentioned, being left $300.00; the rest of her estate, as in her former will, being left to her niece Dorothy Knost (R. 79).

MacMillan came to Washington in October, 1935, and took Mrs. Cameron to many places of amusement and even to night clubs (R. 141). His automobile was always at her door when he was in Washington (R. 319, 320). On December 4, 1935, while Donald MacMillan was still in the District of Columbia and still seeing Mrs. Cameron with frequency, she went to Mr. Guy's office, who had been her attorney ever since her husband died, and again told him that although she was violating her husband's wishes she was going to leave one-half of her residuary estate to MacMillan, and she thereupon executed the will of December 4, 1935 (R. 67). Subsequent to that time and in 1936, MacMillan motored her out to California where she met his family, the MacMillans, and was visited almost daily by them (R. 450, 463, 468). She returned to Washington in June, 1937. MacMillan came back to Washington in the fall of 1937 (R. 417). In October, 1937, Mrs. Cameron visited Mr. Guy, her attorney, and discussed with him her situation fully, even asking if she should pay any attention to the gossip in the neighborhood as to her going around with a younger man (R. 71), making arrangements to sell some stock in order that she could get money to go to California; telling Mr. Guy that Donald MacMillan was here in Washington and that she had bought or contributed to the buying of an automobile in which he was going to drive her out west (R. 70), and that she did not want to take the entire proceeds of the sale of the stock to California with her because she was afraid Donald MacMillan would get it away from her (R. 73). At that time she went over the will of December 4, 1935, and discussed it in detail, paragraph by paragraph, to see if it was the way she wanted it, and said that Donald MacMillan wanted her to leave her entire

estate to him, but since she had left him one-half of her property she would never leave him any more (R. 68, 69, 70, 71). Mr. Guy sold the stock to the extent of about $5300.00, deposited the same to her account and obtained a check from her in the amount of approximately $3,000.00 to be used for the purpose of purchasing such stock as he should select.

Mr. Guy was for years her attorney and adviser and drew all of her wills except the one in California drawn by the doctor brother of the sole beneficiary.

Mrs. Cameron discussed with Mrs. Rogers on this visit the cemetery lots in Cedar Hill Cemetery (R. 50). She drove to California alone with Donald MacMillan in five days, arriving there on October 27, 1937. She was immediately taken to the home of Dr. MacMillan, the draftsman of the will in dispute. There she dined in the bosom of the MacMillan family two days before the will was drafted (R. 27). The making of the new will was discussed at that time (R. 24). Dr. MacMillan, the brother of Donald MacMillan, said he did not want to let her dining with them drag out (R. 28). Dr. MacMillan would not testify whether Donald MacMillan was present or not (R. 28, 29). Donald MacMillan failed to testify that he was not there. In a day or two Mrs. Cameron went to Dr. MacMillan's office, where by chance Gladys Marie Bennett was. She has never been located. The only evidence of any attempt to locate her is a letter and telegrams sent to her in May, 1940 (R. 37, 38, 39, 40, 41, 42). She witnessed the will which was drawn by Dr. MacMillan "in order to save legal expenses," and thereafter typed it in the office of Dr. MacMillan.

The will of November 1, 1937, drafted by the appellant's brother, a doctor, contains this provision:

> "This property of which I may die seized or possessed, is property left to me by my husband. It was his desire that our nephew Donald A. MacMillan receive the estate at my decease."

The will of 1931 made two years after the death of her husband made no mention of any MacMillan (R. 75). The precatory letter of 1933 (R. 103) made no mention of the defendant.

Mrs. Cameron had an attack of shingles in December, 1937 (R. 300), and she wrote her friends here that her condition was such that her doctors advised her that she could not make a trip across the continent by motor again (R. 126). She was attended in her last illness by Dr. MacMillan until she was sent to a nursing home and Dr. Aldrich was called in. She died February 3, 1938, the cause of her death being given as coronary thrombosis, myocarditis, arteriosclerosis, and as a contributing cause ulcers of the left mandible (R. 206). Donald MacMillan wrote her friends two days before her death that she was going to get well (R. 177).

The testatrix died February 3, 1938. Without notice to the caveator or any blood relative the appellant on February 14th applied to the courts of California for letters testamentary, alleging that she was domiciled in California at the time of her death (R. 199, 200). Mrs. Cameron was buried the next day, February 5th. Subsequent to her death it was necessary for the caveator to institute proceedings in the District of Columbia to determine the domicil of the testatrix, in which proceedings Donald MacMillan contested, asserting that Mrs. Cameron was not domiciled in the District of Columbia. A jury in this jurisdiction determined that her domicil was here (R. 4). Thereupon, the caveator, Dorothy Knost, filed the caveat proceedings (R. 9).

The testimony of the caveatee, Donald MacMillan, showed that he had saved all letters which he had received from Mrs. Cameron. It also showed that he had never received a letter from Mr. Cameron (R. 400), and that he had seen his great uncle only three times in his life, once in 1914, once in 1919 and once in 1926 (R. 400). He testified that he was in Washington for the purpose of selling insurance and

falsely said that he had a license as a broker in 1934, but introduced no testimony to show any insurance that he ever sold from 1934 on to the death of Mrs. Cameron. As a matter of fact, the evidence disclosed that he did not have a license until April 17, 1935, and was not licensed to do business in the District of Columbia in 1934 (R. 490). From these letters it is seen that the testatrix wrote the appellant only seven letters in fifteen years until his visit of 1934, and then only courteous replies to his letters. Only one letter was written in 1934, but subsequent to the commencement of his 1934-1935 campaign his telephone calls, letters and visits were continuous and frequent and her replies to him became equally frequent. Further reference will be made to the evidence in the argument to show that the verdict of the jury is fully supported by the testimony.

SPECIFICATION OF ERRORS.

First, the United States Court of Appeals for the District of Columbia erred in reversing the order of the United States District Court which refused probate of the will of Nellie E. Cameron upon verdict of the jury that the same was obtained by undue influence.

Second, the United States Court of Appeals for the District of Columbia erred in not granting the petition of the petitioner for a re-hearing and re-argument of the case before a full court.

ARGUMENT.

I.

The Court of Appeals in reversing the judgment of the trial court refusing to set aside the verdict of the jury, has usurped the function of the jury.

This court in *Berry* v. *United States*, 312 U. S. 450 (decided March 3, 1941) granted a writ of certiorari to determine whether or not the evidence in that case justified a directed verdict. There the jury found that the petitioner

was totally disabled and the Government appealed. The Circuit Court of Appeals upon review held that the plaintiff had not produced sufficient evidence to justify the submission of the cause to the jury. After the writ of certiorari was granted and upon consideration of the evidence, the court reversed the Circuit Court of Appeals on the ground that there was sufficient evidence to sustain the jury's verdict and discussing the new rule authorizing the Circuit Court of Appeals to dismiss a cause instead of remanding for a new trial said:

> "But that rule has not taken away from juries and given to Judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in Courts of law. Here, although there was evidence from which a jury could have reached a contrary conclusion, there was testimony from which a jury could have found these to be the facts;"

In the latest case which has been brought to our attention, decided March 30, 1942, *Jacob* v. *City of New York*, L. Ed. Advance Opinions, Vol. 86, 750, 751, Mr. Justice Murphy in delivering the opinion of the court said:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

Heretofore we have thought the rule well established in the District of Columbia that when a given state of facts is such that reasonable men may differ on them, the case is for the jury. This court in *Gunning* v. *Cooley*, 281 U. S. 91, affirming and quoting the Court of Appeals for the District of Columbia in *Gunning* v. *Cooley*, 58 Appeals 304, 305, said that the motion to set aside the verdict of the jury "could

be granted only when all reasonable men, 'draw but one conclusion from it and that conclusion utterly opposed to the plaintiff's right to recover.' " This principle has been reaffirmed by the United States Court of Appeals for the District of Columbia in a *per curiam* opinion rendered on the 6th day of April, 1942, in the case of *McWilliams* v. *Shepard* (Not yet reported).

The action of the Appellate Court in reversing the judgment of the District Court is clearly in conflict with these decisions.

If we apply this well established test that the verdict of the jury must stand unless all reasonable men draw a conclusion from it utterly opposed to the plaintiff's right to recover, the conclusion is inescapable that the two justices rendering the decision of the Appellate Court reversing the action of the trial court refusing to set aside the verdict of the jury, have usurped the function of the jury and have deprived the petitioner of her Constitutional right to trial by jury.

It may be that we are unable to appreciate the force of the language used by the court below when it stated frankly that the "Appellant's conduct may arouse distaste in reasonable men. Reasonable men measuring his conduct by their individual standards may even call it improper. The jury in effect have done so."; yet held the evidence did not support a finding that the appellant's conduct was improper according to "commonly accepted standards." Nevertheless, we think it is an irresistible conclusion from this language that all reasonable men would not draw a conclusion therefrom utterly opposed to the plaintiff's right to recover on the ground that the defendant's conduct in obtaining the execution and delivery of the will was improper.

We must assume that all of the judges who participated in this case are reasonable men. Mr. Justice Adkins refused to direct the verdict in the first trial of the case or to find for the respondent notwithstanding the verdict after

the jury disagreed. Mr. Justice Proctor refused to set aside the verdict of the jury, saying (R. 516):

> "If it be true, as argued by counsel for caveatee, that the testimony of no single witness reveals any substantial evidence of undue influence, nevertheless out of the whole mass of evidence there does arise indisputable facts and circumstances from which such inference may reasonably be drawn. An intelligent and attentive jury so found. Notwithstanding the earnest and able arguments of counsel for the caveatee, I can see no just ground for disturbing their verdict. Therefore the motion is denied. The Clerk will enter an order accordingly."

We must assume also that the jury whom Justice Proctor described as "an intelligent and attentive jury" are reasonable men. We also must assume that the Chief Justice of the Appellate Court who was of opinion that the evidence supported the verdict is a reasonable man. When two judges of the District Court and twelve jurors who saw the witnesses and heard the evidence, agreed that the facts were sufficient to support a finding of undue influence (the Chief Justice being of the same opinion), and two justices rendered the opinion who never had had the advantage of seeing the witnesses or hearing the evidence and disagreed with the three judges and the twelve jurors, it can hardly be said that the facts of the case are such that at least all reasonable men draw a conclusion from them utterly opposed to the plaintiff's right to recover.

Therefore, it seems conclusive that the two judges who overruled the verdict of the jury of twelve men and disagreed with the three judges who agreed with the jury, set themselves up as a jury of facts superior to the jury which actually heard the evidence and saw the witnesses, and thus deprived the petitioner of her right of a trial by jury on the issues of fact in violation of the Seventh Amendment to the Constitution of the United States. The tendency of Appellate Courts to usurp the functions of the jury should not be encouraged.

It is true the Appellate Court below after saying that the appellant's conduct might arouse distaste in reasonable men and such men might even call his conduct improper and that the jury had done so, qualifies its statement by saying that the evidence did not support a finding "that appellant's conduct was improper according to commonly accepted standards." We are not given a measuring rod to determine the commonly accepted standards of conduct in a young man's courting and soliciting an aged woman to leave him, an alien to her blood, all her property. The judgment of an intelligent jury who saw the witnesses and heard the testimony should set the standard. If his conduct is deemed "distasteful" by reasonable men, it certainly should not be held to measure up to commonly accepted standards. If such conduct is considered "improper" by reasonable men, certainly it should be considered to be far "below the commonly accepted standards." Even if it is of such doubtful character as to require its propriety to be submitted by two reasonable and learned Judges, who saw and heard the witnesses, to two juries for consideration, the first of which could not agree, but the latter "an intelligent and attentive jury" held such conduct improper, and when the Chief Justice of the Appellate Court, a trial lawyer and a trial Judge of long experience and great ability, concurs with two Justices and the jury below, the question of the propriety of such conduct and its influence on the testatrix is clearly for the jury.

If the "individual standards" of the Chief Justice and the two Judges who tried the case and jury who heard the witnesses are too high to be commonly accepted standards, what is the measure to be applied? The deduction is irresistible that the Appellate Court feels that "the commonly accepted standards" are far below that accepted by the Judges and the jury who found the appellant's conduct improper.

We reassert that it deprives petitioner of her right to jury trial to have two justices of the court below reverse

the verdict of the jury, giving approbation to a course of conduct as not below "commonly accepted standards," which conduct aroused "distaste" in reasonable men and "which reasonable men measuring his conduct by their individual standards may even call improper."

II.

The evidence fully supported the verdict of the jury.

Before analyzing the evidence for the caveator below, we point out some of the facts stated in the opinion of the Appellate Court below fully warranting the submission of the case to the jury. The opinion admits in effect that MacMillan, the respondent herein, carried on a campaign to secure for himself the estate of this woman, alien to his blood, twice his age, but says: "Fortunately for aged widows, though sometimes unfortunately for their next of kin, the law does not penalize such campaigns." The result of this legal conclusion of the court below, if it remains unreversed, is that in the District of Columbia it is an open season and a rich field for gigolos to prey upon aged widows.

As a part of this campaign, the court below points out:

> "In October, 1937, just before the testatrix drove to California with appellant, she told her lawyer that she did not want to carry $5,000 in cash, and was afraid appellant would get it away from her if she did so. She went over her then existing will with the lawyer, and said that appellant had asked her to change it so as to make him sole beneficiary but she would never change it."

The opinion further points out his attentions to the aged testatrix, taking her on long automobile trips including the one to California shortly before she made the will and further said that she made "doting" references to him, reciting the incident when she became violently jealous because a Miss Hammersley went out the door with MacMillan. Why a jealousy of a 76-year-old woman as to a 41-year-old man?

The court did not quote from the record the correspondence between Mrs. Cameron and MacMillan relative to the perfectly innocent incident which made Mrs. Cameron so violently jealous. The record also shows that this jealousy went to such lengths that she made the appellant promise her that he would never see or speak to these people again. For instance, Mrs. Cameron says in her letter of July 28, 1935 (R. 348):

> "Donald, you didn't give the Ex-pretended friend your address, did you? I hope not. *I haven't been near my cousin since you left and that isn't all, only the death of my cousin will take me there,* and I might be the one to go first." (Italics supplied)

The testimony of MacMillan on the same page clearly shows that this reference is to the testatrix' cousin, Mrs. Brashears, and to Miss Hammersley.

Again in the letter of September 5, 1935 (R. 350), Mrs. Cameron wrote the appellant:

> "another promise, please, that you will not see those two that we were kind enough to call on the last Sunday we were together, for I know that if you make this promise you will keep it. You are honorable, of that I am sure. I utterly loath that one person, above everything else I don't want her in my life for any thing. So what say you Donald. I have kept out of her way—*so am sure we can work together, having a different color car we will not be so conspicuous* * * * " (Italics supplied)

What proper conduct on the part of this young man influenced this unnatural change in attitude of the testatrix to her former friend and dying relative, Mrs. Brashears? And why the desire to "not be so conspicuous"?

Every element of undue influence was proven in the case, to wit: (a) the opportunity for exercising undue influence, (b) the result indicating the exercise of undue influence, (c) the testatrix was an easy subject for undue influence and (d) the disposition of the sole beneficiary to exercise

undue influence. In re *Link's Will,* 1930, 202 Wisconsin 1, 231 N. W. 177.

(a) The opportunity for exercising undue influence.

The testatrix made three wills. The will of 1931, made two years after the death of her husband, made no mention of any MacMillan (R. 75). A precatory letter of 1933 (R. 103) made no mention of MacMillan. In 1935 he came to Washington and paid her constant attention. Pierce for the appellant (R. 319) said that his car was at the testatrix' home practically every day and he used to take her out to dinner, just the two of them.

When MacMillan left Washington, May 1934, to go back to California he kept the testatrix posted on his journey (R. 331). She wrote him "I appreciate your calling me almost every evening and the nice drives we had". Why this attention and solicitude for a person whom before 1934 he had seen one day since he was 20 years old?

MacMillan drove Mrs. Cameron in 1935 from Portsmouth, Ohio, to Washington (R. 130). After his return to California, she wrote him (R. 554) that the will she had did not exactly fit the situation and that she had an appointment with her attorney. She thereupon in the first will of 1935 left him $300, although declaring that she was violating her husband's wishes (R. 66). He was back in Washington in October and November 1935, still paying her continuous attention. Thereupon she made the will of December 4, 1935, leaving him one-half of the residue of her property in addition to the $300, again declaring she was violating her husband's wishes (R. 66). These two wills were drafted by Walter B. Guy, a lawyer in the District of Columbia, who testified as follows: (R. 66)

> "Q. In the first will of 1935, Mr. MacMillan was left $300. A. My recollection is that Mr. MacMillan was not mentioned at all in the first will.
>
> Q. 1931? A. The will of 1931.
>
> Q. Yes. A. And that he was made a beneficiary of a specific bequest of $300 at that time, and the explanation was that Mrs. Cameron wanted to do that, although she understood there was some objection—that there

had been some objection in her husband's mind to leaving him anything." (R. 66.)

"Q. Do you recall in that connection you had any discussion with Mrs. Cameron relative to leaving Donald MacMillan any other money? A. Yes, I had a discussion with her at that time, and I discussed that will with her again immediately before she left for California. She had decided at that time to divide the property, as I recall it, equally between her branch of the family, and the various connections of Mr. Cameron, although I still understand she thought it was contrary to Mr. Cameron's wishes."

* * * * * * * * *

"The Witness: At the time of the execution of this particular will, and I am referring to the will of December 4, 1935, I now have no recollection of any discussion with Mrs. Cameron about Donald MacMillan or a bequest to Donald MacMillan, except that she had decided to give him half the residue of the property and give the balance of it to her own relatives, and that her action in that regard she considered somewhat in violation of her husband's wishes."

It must be remembered that the will in question in this case—the will of November 1, 1937, drafted by MacMillan's brother and agreed upon in MacMillan's home, executed upon her arrival in California after he had the sole care, custody and control of this 76-year-old woman on a five-day transcontinental speed test, contained the provision already set out herein, that

"This property of which I may die seized or possessed, is property left to me by my husband. It was his desire that our nephew Donald A. MacMillan receive the estate at my decease."

No attorney was called in to advise the aged testatrix and the will was made for Mrs. Cameron and not by her since it was wholly contrary to her previous declarations and her previous wills where she had declared that her husband did not wish any of his property to go to his family.

From the time Mrs. Cameron went over the will of December 4, 1935, with her attorney and expressed her satisfaction with it to her next door neighbor, she was solely under the care, control and protection of MacMillan until the new will was made in which he was sole beneficiary. Thus MacMillan had every opportunity for exercising undue influence. The will was delivered to him Thanksgiving night after all the family had left, and was in his possession at the time the testatrix died (R. 300).

b. The result indicates the exercise of undue influence.

The most devoted relationship existed between the niece and her aunt, the testatrix, until this young Lochinvar came out of the west. She haid raised her niece's father, who in turn contributed to her support and supported her until her marriage. The will is directly contrary to the disposition of her estate in former wills and directly contrary to her statements made the day before she left Washington. If, as the will declares, she made MacMillan her sole beneficiary because it was the desire of her husband, the natural query is why this granduncle should have selected out of all his relatives this particular grandnephew, and why the testatrix failed to obey her husband's wishes in the wills executed before she came under the influence and domination of the sole beneficiary?

The following facts clearly indicate the exercise of undue influence: (1) the change of the previous wills making more natural disposition of the estate, (2) the wills contrary to her expressed intention made before she left Washington for California, (3) the sudden cutting off of her bequests to her relatives and former friends, even the small bequest to her church, (4) the false statement in the will that it was made according to her husband's wishes, (5) the statement that although MacMillan was the sole beneficiary anyone contesting the will should receive $1.00, making it uniquely certain that the will was made for the testatrix and not by her.

c. The testatrix was an easy subject for undue influence.

She was 76 years of age, physically suffering from diseases obliged to have existed prior to the execution of the will, and the will was executed after a speedy trip across the continent against the advice of her physician that she should not take long automobile trips. MacMillan knew this. (R. 331, 354)

The testatrix was easy to flatter. One of the witnesses for the respondent testified that she could have persuaded her to have left her all of her property (R. 117, 118). She got a first permanent wave to surprise MacMillan and treasured his cigar ashes (R. 191), and was thoroughly jealous of him (R. 185).

(d) The disposition of the sole beneficiary to exercise undue influence.

MacMillan said he came to Washington in 1934 to sell life insurance. This was false because he obtained no license to sell life insurance at that time. He came as a fortune hunter and began unremitting attentions to this aged woman, allowing her to spend money on him and driving her on automobile trips. His disposition is clearly shown by Mrs. Cameron's statement to her attorney that he was trying to get all of her property from her and she was afraid to carry much money to California because he would get it all. His attitude betrays a grasping disposition and his insistence that he be made the sole recipient of her property rather than those to whom she was bound by ties of blood and years of affection. He notified no one of her death and despite the fact that the will itself showed she was domiciled at 440 Park Road, N. W., Washington, D. C. and in the face of letters in his possession showing to the contrary (R. 286) he falsely made oath in order to qualify upon this estate in California that she was a resident in California, and finally he had the will filed for probate even before he buried the testatrix.

In the face of this evidence, it is scarcely to be wondered at that although setting aside the verdict of the jury, the Appellate Court conceded that the conduct of the sole bene-

ficiary "may arouse distaste in reasonable men. Reasonable men measuring his conduct by their individual standards may even call it improper," and makes it certain that the Appellate Court usurped the function of the jury and set itself up as a jury of the facts superior to the twelve men who actually heard the evidence and saw the witnesses

Further than this it is perfectly apparent from the evidence that a confidential relationship existed between the testatrix and the sole beneficiary, raising the presumption of undue influence. It was contended by counsel for the sole beneficiary that the testatrix treated the sole beneficiary "as a mother would a son, and referred to him as 'her Donald'" (R. 445). Whether that relationship was similar to that of mother and son or whether she was infatuated by him, as shown by her school girl letters and the facts heretofore set out, she consulted him about her will (R. 354). He knew who were the beneficiaries in the former will (R. 430, 431). He knew about her cemetery lots. He carried her into her banks and she allowed him to open an account for her, to advise her about her securities and about the renting of her house. She was under his sole care, protection and custody and influence from the time she had expressed to her attorney in Washington her satisfaction with her old will up until the execution of the new will making him sole beneficiary. This confidential relationship, coupled with an unequalled opportunity to exercise undue influence, raises a presumption of undue influence and casts the burden upon the sole beneficiary to overcome this presumption. *Whitelaw* v. *Sims*, 90 Va. 588, 590.

In the Virginia case cited above, it was held that where a will executed by an old man differs from his previously expressed intentions and is made in favor of those who stand in that relationship of confidence or dependence "it raises a violent presumption of fraud and undue influence which should be overcome by satisfactory testimony." The court further said that where a will which runs counter to

the natural wish of the testator that the property should devolve after death on his kin, and settlement is made in favor of one who is so placed to have a controlling power over the testator's mind, it is not unreasonable to require him to show that he did not bring about a result that would have resulted in the normal course of events. See also in re: *Gottschalk's Estate*, June 14, 1940 (Fla.), 196 Southern 844. *Hagerty* v. *Olmstead*, 39 Appeals D. C. 170, 175.

III.

There is no statutory authority for a decision of any case by the Appellate Court below by less than a full court except by stipulation of parties.

The question of whether or not the United States Court of Appeals for the District of Columbia has authority to reverse the action of the lower court by a decision of two out of its six members sitting on a three judge court, has agitated the Bar of the District of Columbia, since the custom was adopted by that court to sit in divisions of three after the increase of the number of judges to six.

The Appellate Court below is the court of last resort in this jurisdiction. It may be fair to point out that the Bar Association of the District of Columbia has registered a protest against this custom and it is greatly in the public interest that the right of this court so to divide and sit in divisions may be authoritatively determined. For this reason and because the decision by the two justices uniting in the majority opinion in the instant case runs counter to the judgment of two judges below and to the judgment of the Chief Justice and is thus a reversal by a minority of the justices who considered the question, we respectfully urge the granting of a writ of certiorari and an authoritative determination of this question of widespread interest to the public and profession.

Upon the hearing in the Appellate Court below, there was no original motion made for a hearing before a full court, but if we are correct in our conclusion that the statutes con-

fer jurisdiction upon only a *full* Appellate Court to determine and decide a case on appeal from the United States Court for the District of Columbia, except by stipulation, this lack of authority is jurisdictional and no motion for a hearing before a full court was necessary. See *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 18.

The authority of the court below to sit as an appellate court to consider the decisions of the District Court must be found in the statutes creating and enlarging the court.

The Act of February 9, 1893 (27th Stat. 434) establishing a Court of Appeals for the District of Columbia, provided that it should consist of one Chief Justice and two Associate Justices. The Act further provided (now Title II, Section 205 of the Code of 1940) that if any member of the court should be absent on account of illness or be disqualified or if for any reason it should be impracticable to obtain a *full* court of three justices, a justice of the District Court of the United States should be chosen to temporarily fill the vacancy or if the parties shall stipulate in writing, such cause might be heard and determined by two justices without calling in any justice of the District Court.

At the time of the increase in the membership of the court, there was no amendment to this organic act providing for a full court to hear and determine cases and no act has been passed since providing that the court might function by a quorum of less than all of the justices. It is so clear that it calls for no construction that the object of the original act was to provide that a full court should hear all cases. This provision was continued in the law when the court was increased to five and a full court now consists of six justices. The only statutory authority to hear and determine appeals from the District Court of the United States for the District of Columbia was conferred upon the "full" court, first of three justices, next of five justices and now of six justices.

In determining the authority of any Federal court to decide any given case we must look to the statute. The Judicial Code, U. S. C. A. Title 28, Sec. 321, provides:

"The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight Associate Justices, *any six of whom shall constitute a quorum.*"

The Judicial Code, U. S. C. A. Title 28, Sec. 243, providing for the United States Court of Claims, consisting of a Chief Justice and four Associate Justices, provides that three of them shall constitute a quorum and that the concurrence of three Judges shall be necessary for the decision of a case. The statutes relative to the Court of Customs and Patent Appeals, U. S. C. A. Title 28, Sec. 301, provides that three members shall constitute a quorum and the concurrence of three members shall be necessary for any decision. In other words, neither in the Court of Claims nor in the Court of Customs and Patent Appeals can two of three Judges comprising the Court render a decision.

Section 117 of the Judicial Code (28 U. S. C. A. Sec. 212) provides that in each circuit the Circuit Court of Appeals shall consist of three Judges, of whom two shall constitute a quorum. Later on Section 118 of the Judicial Code provided for four circuit Judges in the Second, Seventh and Eighth Circuits, two in the Fourth Circuit and three in each of the others, who were made *ex officio* Judges of the Circuit Court of Appeals, and the question arose as to whether the Circuit Court of Appeals in those Circuits having more than three Circuit Judges consisted of all the Circuit Judges or only three of them, and if the latter, which three. This question was recently determined (December 8, 1941) by this Court in *Textile Mills Corp.* v. *Comm. of Int. Rev.*, Advanced Sheets of the United States Supreme Court, Vol. 86, No. 3, p. 242. It was there contended that under Section 117 the Court consisted of only three Judges and that five Judges in that Circuit had no power to sit *en banc*. In determining this question the Court reviewed the statutes and said (p. 246):

> "We cannot conclude, however, that the word 'court' as used in those other provisions of the Judicial Code means only three judges. That would not only produce a most awkward situation; it would on *all* matters disenfranchise some circuit judges against the clear intendment of Sec. 118. Nor can we conclude that the word 'court' means only three judges when the court is sitting, but all the judges when other functions are performed. Certainly there is no specific authority for that construction. And it is difficult to reach that conclusion by inference. For to do so would be to imply that Congress prohibited some circuit judges from participation in the most important function of the 'court' (the hearing and the decision of appeals), though allowing all of them to perform the other functions. Such a prohibition as respects the ordinary responsibilities of a judicial office should be inferred only under compelling necessity, since a court usually will consist of all the judges appointed to it. That necessity is not present here."

In the light of this decision we think it is not too much to say that where the statutory authority conferred upon the United States Court of Appeals for the District of Columbia is conferred upon the *full* court, that this Court should consist of all the Judges appointed to it, who in the absence of specific authority to the contrary, should participate "in the most important function of the 'court' (the hearing and decision of appeals)."

It is significant that when Congress has provided for a quorum of three judges out of a larger number, it has required three to concur in the decision, and if Congress had desired that the Court of Appeals should function by a court of three and a decision by two out of six members, such a provision would have been incorporated in the statute. In the absence of such a provision, with the original statute providing for a determination of any cause by a "full court," it would seem clear that the court has no statutory authority to divide itself into two parts any more than it could divide itself into six parts and have one judge function as a quorum of the court. The six justices function as one court, not two courts nor six.

To quote the language of Mr. Justice Douglas in the *Textile Mills* case, *supra*, "since the court usually will consist of all the judges appointed to it," and since there is no statutory authority for less than all the judges appointed to it sitting as a court and participating in the hearing and decision of appeals, we respectfully urge that the decision below is not the judgment of the Court but is merely the opinion of the two Justices who united in it.*

We submit that in a case involving the fundamental right of jury trial the full court of last resort in this jurisdiction should hear and determine the issue. When the full court hears and determines the case, it obviates the hazard of decision by a minority and "makes for more effectual judicial administration" (*Textile Mills* case, *supra*).

As was said by the Committee on Judiciary of the House, H. R. 1246, 77th Cong. 1st Sess., printed in the note to the Opinion in the *Textile Mills* case, *supra* (P. 247):

> "If the court can sit in banc the situation where two three-judge courts may reach conflicting conclusions is obviated. It also will obviate the situation where there are seven members of the court and as sometimes happens a decision of two judges (there having been a dissent) sets the precedent for the remaining judges. A similar result would be avoided with a court of five judges."

IV.

The refusal of the court below to grant a rehearing and reargument before the full court is arbitrary and a violation of judicial discretion.

When it appeared in the opinion of the court below that a consideration of the record by the judges who wrote the opinion persuaded them that the conduct of the respondent was such as to create distaste in reasonable men and that reasonable men and the jury had in effect called his con-

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* Compare *Gorman et al.* v. *The Washington University*, No. 711, Oct. Term, 1941, decided Apr. 27, 1942.

duct improper in obtaining the will under consideration, we felt that the Appellate Court exercising a sound judicial discretion should grant a rehearing and reargument before the full court. We therefore filed a petition for a rehearing, pointing out that the petitioner should not be left to the hazard of having two out of six judges determine whether or not she was deprived of her right of jury trial by the opinion of the two judges who reversed the judgment of two judges below who deemed the evidence sufficient to submit to the jury and when the Chief Justice was of opinion that the verdict was supported by the evidence. This petition was denied.

Aside therefore from the lack of statutory authority of two judges out of six to reverse the judgment of the courts below and set aside a verdict of the jury on a question of fact, we assert that it was arbitrary and an abuse of judicial discretion to refuse to submit a "right so fundamental and sacred to the citizen" for determination by the full court when a majority of the judges who had considered the case thought the verdict of the jury was sustained by the evidence.

Considering the unusual circumstances arising from the language of the opinion setting aside the verdict of the jury on a question of fact, the division of opinion among the three Appellate judges and the concurring judgment of two trial judges that the evidence was sufficient for submitting the case to the jury, we respectfully submit that the Appellate Court should not have deprived the petitioner of her right of jury trial in the absence of the full court.

On the contrary the court below should have followed the practice and precedent adopted by this court in the *Legal Tender cases*, 12 Wall. 457, 553, overruling *Hepburn* v. *Griswold*, 8 Wall. 603, where this court said of the latter case:

> "That case was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have. These cases have been heard before a full court, and they have

received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right. We are not accustomed to hear them in the absence of a *full* court, if it can be avoided." (Italics ours.)

CONCLUSION.

Petitioner therefore prays that a writ of certiorari may issue and upon a review, the judgment of the United States Court of Appeals for the District of Columbia be vacated, reversed and set aside, and the judgment of the District Court for the District of Columbia be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 121.

DOROTHY K. KNOST, *Petitioner,*

v.

DONALD A. MACMILLAN, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The memorandum opinion of the Justice of the United States District Court for the District of Columbia denying the motion for judgment *non obstante veredicto*, or for a new trial, is not officially reported but appears in the record at page 516. The opinion of the United States Court of Appeals for the District of Columbia (R. 527-529) is reported in 126 F. (2d) 235.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 9, 1942 (R. 530). The petition for rehearing was denied on March 30, 1942 (R. 538). The petition for certiorari was filed on June 5, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

The decedent made a will, giving all, where theretofore she had given only half of her estate, to her husband's nephew. This will, unlike her prior wills, was not drawn by her Washington lawyer. She had an older brother of the beneficiary in California help her write it, modeling it after his will. She was well, traveling about alone, and admittedly of sound and disposing mind. A niece, from whom she had been estranged for a year before her death, but who had been a beneficiary in the earlier will, charged that the last will was obtained by undue influence, basing the charge on an innuendo of improper infatuation of the 76 year old woman for her 41 year old nephew. The jury sustained the charge. The trial court denied a motion for a directed verdict, and denied a motion for a verdict *non obstante veredicto* or, in the alternative, a new trial, and entered an order refusing probate of the will.

On appeal, the United States Court of Appeals for the District of Columbia, in a two to one decision, reversed the trial court, on the ground that there was no legal evidence of undue influence. Petitioner's motion for a rehearing before all six of the judges of the United States Court of Appeals for the District of Columbia was denied.

The only questions presented are (a) whether it usurps the functions of a jury for two judges, out of three sitting, to reverse the trial court in denying a motion *non obstante veredicto*, and (b) whether it was an abuse of discretion to deny petitioner's request for a rehearing before all the judges of the United States Court of Appeals for the District of Columbia.

STATUTES AND OTHER MATERIAL INVOLVED.

Title 19, Chapter 3, Sections 301, 305, 307, 311 and 312 of the District of Columbia Code (1940 Edition) relating to the Probate of Wills, are set out in the Appendix.

Pertinent portions of the Organic Act, the Act of Feb. 9, 1893, c. 74, 27 Stat. 434, Secs. 1 and 6, creating the Court of Appeals for the District of Columbia and also Title 11, Chapter 2, Secs. 201 and 205, District of Columbia Code (1940 Edition), each relating to a "full court" are also in the Appendix to this brief.

For the convenience of comparison with the provisions of the Code of the District of Columbia, Judicial Code Sections 117 and 120 are printed in the Appendix.

STATEMENT.

The purpose of this petition is to have this Court review the record of a will contest in the District of Columbia, where petitioner charged that her aunt's last will was obtained by undue influence.

The testamentary capacity of deceased and her physical vigor at the time of making the will are all admitted.

Mrs. Nellie E. Cameron, the deceased, a widow residing in Washington (R. 1), was "a very lovable and sincere old lady" and "very straightforward" (R.

239). A Washington lawyer, Walter Guy, had probated her husband's estate, from which she received what money she had. He also drew her prior will, in which she divided her estate practically equally between her niece, Dorothy Knost, petitioner herein, and her husband's nephew, Donald MacMillan, respondent (R. 83-85).

During Mrs. Cameron's later years, after she was 70, living alone in Washington, the petitioner, living in Ohio, never visited, seldom wrote, and never phoned or wired her aunt. She acknowledged the existence, during these years, of a growing estrangement from her aunt (R. 159-160).

In 1937, about a year before Mrs. Cameron's death, petitioner sent deceased a formal, unloving letter (Caveator's exhibit 12) refusing a simple request the old lady had made for the return of a keepsake (R. 136-137). This letter grieved deceased deeply. She spoke often to strangers about it saying (R. 449) that she was "ashamed" of her own relatives. She carried it around in her purse, where it was found at her death (R. 325).

Meantime, the MacMillan family, including all of respondent's brothers and sisters, at various times from 1933 to 1937, visited Mrs. Cameron in Washington. Dan came up from the University of Alabama (R. 309); the doctor, Douglas, whom later Mrs. Cameron asked to help her write the challenged will, stopped enroute to Europe, where in 1933 he went to do postgraduate work in medicine (R. 331); and the girls, two of them nurses, and one the family housekeeper, stopped enroute to New York (R. 311, 377). Donald (respondent) took her out almost daily whenever he came in his car to the Washington office of the New York Life Insurance Co., for which company he

worked. As early as 1934, deceased expressed appreciation for this attention saying, (R. 331, Caveatee's Exhibit 41)

> "You can't imagine how much I miss you, Donald. I appreciated your calling me almost every evening—then the nice auto drives we had. I looked forward to the phone calls—nice to have someone take that much interest in an old lady".

For two years before her death Mrs. Cameron referred to the MacMillan family as "my boys and girls" (R. 249, 263, 279, 299, 377, 391, 395). Donald was her favorite. He, as a boy, in response to his uncle's request (R. 306), had come from Canada, spending the summer of 1919 with his aunt and uncle in Washington. Always thereafter deceased had written him frequently and lovingly, signing her letters "Aunt Nellie" and writing for both herself and her husband, giving Donald motherly advice on business and on his marriage and divorce (R. 325-399).

Another bond between respondent and deceased was her solicitude and affection for two bedridden cousins of hers, who lived in Long Beach, California. Over many years Donald MacMillan and his sisters visited these invalids, and for this kindness the deceased expressed repeated gratitude (R. 312, R. 325-399).

Respondent drove deceased to California in 1936, where she visited the cousins in Long Beach and lived for the winter season at the Hershey-Arms Hotel (R. 310, R. 243-247).

During the time from 1936 to 1938, except for a birthday and a Christmas card (R. 148), Mrs. Knost never gave her aunt any attention, her very last (R. 148) communication being the cold, unloving letter (Caveator's Exhibit 12) which grieved deceased so much.

In the spring of 1937, respondent drove Mrs. Cameron back to Washington. While alone in Washington, when no MacMillans were visiting her, and none was even near, she sent back Mrs. Knost's framed photograph, writing that she was "through with it". (R. 390, 392.)

Speaking then of petitioner, deceased said, "I can't understand how a woman can play such beautiful music and be so cruel at heart" (R. 264). Mrs. Knost never wrote, wired or phoned, or made any effort to renew affectionate relations, although she admitted receiving the framed photograph, and a letter from her aunt saying that she was "through with it". (R. 149.)

In the fall of 1937, respondent again drove deceased to California (R. 266). She was overjoyed to be back (R. 446) and shortly thereafter went to Dr. MacMillan's office to have him help her make a will with Donald the sole beneficiary (R. 23, 24, 30). They modeled it after the Doctor's will, and Mrs. Cameron carried it away in her purse (R. 31).

At the time of making this last will, and for three months thereafter, Mrs. Cameron was living at the Hershey-Arms Hotel in Los Angeles, under no restraint or surveillance from anyone, paying her own bills, going about as she pleased, and writing frequently to her friends (R. 249).

A month after making the will she gave a family party (R. 464-5), just for the MacMillans, and after a particularly happy time (R. 273, 299, 447), she presented the will to Donald (R. 300), saying it was "small appreciation on my part for the pleasures you have made for me * * *".

For two months after making the will deceased was in communication with her lawyer in Washington. In letters to him she spoke of her happiness, but she ex-

pressed no word of dissatisfaction with the will she, with Dr. MacMillan's help, had drawn (R. 95-6).

None of the above facts is refuted in any way in the record.

In the light of such facts—disinheriting a niece whom deceased had not seen for three years, from whom she had received a cold letter that hurt and to whom she had returned a portrait with the comment that she was "through"—in favor of her husband's nephew, who, with his brothers and sisters, had loved her, been "family" to her and had made her last years happy and interesting, is a natural, normal act.

Furthermore, the innuendo of improper "infatuation" between the "73 year old deceased and 37 year old respondent", which confused and mislead the jury, which was persisted in before the Court of Appeals, and which is even suggested to this Court, is repulsive in the light of the undisputed facts.

ARGUMENT.

The United States Court of Appeals for the District of Columbia, in reversing the District Court, has not usurped the functions of the jury. The petitioner had every right of a jury trial. But—in availing herself of the right to try these issues by a jury she cannot sidestep control of the jury by the court, nor avoid the result of the judge passing upon a motion for a directed verdict, or the motion *non obstante veredicto,* each of which test the sufficiency of the evidence, ~~and~~ which is the sole responsibility of the court. Nor has she any legal grounds for the complaint that she has been deprived of a jury trial, through the Court of Appeals reversing the trial court on such motions. In doing so, the Court of Appeals reviewed only the functions of the trial judge—*not* the functions of the jury. *Baltimore*

and C. Line v. *Redman,* 295 U. S. 654, 79 L. Ed. 1636; *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389, 81 L. Ed. 1177.

Berry v. *United States,* 312 U. S. 450, 85 L. Ed. 945; *Conway* v. *O'Brien,* 312 U. S. 492, 85 L. Ed. 969; *Halliday* v. *United States,* Law Ed. Adv. Op. Vol. 86, p. 393, are not controlling here. In the *Conway* (footnote No. 3, p. 493) and *Berry* (p. 451) and the *Halliday* (p. 394) cases, although in each instance, the defendant moved for a directed verdict, he failed, in each case, to move for a judgment *non obstante veredicto* within the ten days provided in Rule 50 (b).

In the instant case there are two circumstances which distinguish it from cases on which petitioner relies,—first, the judgment of reversal of the Court of Appeals rests upon a review of the denial of the motion *non obstante veredicto,* which made it a review of the functions of the court, and not a review of the functions of a jury, and, second, the case is based on statutes limited to the District of Columbia, not those of general jurisdiction.

Nor is there any merit in petitioner's statement that "there is no statutory authority for the decision of any case by the Appellate Court below by less than a full court", when that statement is coupled with her argument that the words "full court" in the statute mean all the judges.

In *Textile Mills Securities Corporation* v. *Commissioner of Internal Revenue,* L. Ed. Advance Opinions Vol. 86, p. 242, a rule of common sense is offered as the proper way to measure the meaning of such a statute:

> "* * * the conclusion that § 117 provides merely the permissible complement of judges for a Circuit Court of Appeals results in greater harmony in the statutory scheme than if the language of § 117 is taken too literally. And any sacrifice

of literalness for common sense does no violence to the history of § 117."

It is true that there is a slight variation in the lan-uage of the Acts creating and governing the United tates Court of Appeals for the District of Columbia rom those relating to other Circuit Courts of Appeals, ut the expression "a full court" is found in both. (cf. udicial Code, Section 120 and Sec. 205, Title 11 of the ode of the District of Columbia set out in the Appen-ix.) The words "full court", as used in each Act, efer to a court of three judges as originally constituted. o interpret it so that every judge on the court would ave to sit in every case, would defeat the legislative urpose of enlarging the number of judges above three, hich was to dispose of larger dockets.

Likewise, petitioner's argument that it was arbitrary ot to grant a rehearing by *all* of the judges when peti-oner demanded it, offends the rule of common sense, ecause if petitioner were right, it would mean that very defeated litigant could, at will, requisition the me of every member of the court to review a decision ith which he was dissatisfied.

The Court of Appeals correctly applied *Gunning* v. *oley*, 281 U. S. 90; 74 L. Ed. 720. Petitioner misuses in her effort to invoke this Court's jurisdiction and sert a conflict of decisions. In that case this Court arified confused views of the justices of the Court of ppeals of the District of Columbia on when a motion r a directed verdict must be denied. This Court com-ented (p. 95) that the opinion seemed to rest "upon e conception that the rule stated by the Chief Justice quired denial of defendant's motion if plaintiff's ims were supported by *any* evidence, however ght". Pointing out that "that is not the rule applied Federal courts",—the correct rule was stated that—

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed' ".

In the instant case the Court of Appeals for the District of Columbia reviewed the "preliminary question" which was before the trial judge and, applying the above rule, decided that innuendo and inferences which had confused the jury did not constitute evidence "upon which the jury could properly proceed to find a verdict" of undue influence.

Certiorari should be denied because the decision below is based upon a statute confined in its operation to the District of Columbia, namely, the law providing for the admission of a will to probate in the District of Columbia, caveat thereon, and the trial of issues raised by caveat. Consequently the case does not fall within Rule 38. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285; 80 L. Ed. 229.

CONCLUSION.

There is no conflict with any decision of this Court, or any other court, and no important point of Federal law is involved. As the Court of Appeals said in its opinion (R. 527-529) "There is no evidence that the will was not in accordance with her (Mrs. Cameron's) wishes when, and after, she made it", and there is "no evidence of oppression or coercion" and "no evidence of improper conduct, as we interpret that term". "Moreover possibility or suspicion of undue influence

is not enough," citing *Beyer* v. *LeFevre,* 186 U. S. 114, 126; *Brooke* v. *Barnes,* 61 App. D. C. 161, 58 F. (2d) 887.

The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX.

District of Columbia Code (1940 Edition).

Title 19—WILLS, Chapter 3—Probate of Wills.

Sec. 19-301. Citation—Notice by publication—Unknown heirs at law and next of kin.

Upon the filing of a petition for probate of a will a citation shall be issued to all persons who would be entitled to or interested in the estate of the testator in case such will had not been executed to appear in said court on a day named, not earlier than ten days, exclusive of Sundays, after the filing of said petition, and show cause why the prayer of the petition should not be granted. If said citation shall appear from the return thereof to have been served upon all said persons at least five days before the day named as aforesaid, the said court shall proceed, if no caveat be filed, to take the proofs of the execution of said will. * * *

Sec. 19-305. Proof of will—Production of witnesses.

On the day appointed as aforesaid, or such subsequent day as the court may appoint, due proof of such publication and mailing being made, the court shall proceed to take proof of the will. All the witnesses to such will who are within the District and competent to testify must be produced and examined, or the absence of any of them satisfactorily accounted for.

Sec. 19-307. Caveat—Will not to be probated while issues pending.

If, upon or prior to the hearing of the application to admit the will to probate, any party in interest shall file a caveat in opposition, duly verified, and setting forth facts inconsistent with the validity of the will, the said will shall not be admitted to probate until the issues raised by said caveat shall be determined, as hereinafter directed.

Sec. 19-311. Plenary proceedings.

The court may, in all cases of controversy therein, direct a plenary proceeding to be had, by bill or petition, to which there shall be answer under oath, which may be compelled by the usual process, and all the depositions shall be taken down in writing and filed; or, if either party shall require it, the court shall direct an issue to be made up to be tried by a jury.

Sec. 19-312. Trial of issues as to wills—Trial by jury—Notice—Service to absent parties not essential for jurisdiction—Judgment.

Whenever any caveat shall be filed, issues shall be framed under the direction of the court for trial by jury: *Provided,* That in all cases in which all persons interested are sui juris and before the court the issues may be tried and determined by the court, without a jury, upon the written consent of all such parties. If they are to be tried by a jury, they shall be triable in said probate court by petit jurors drawn for service in the District Court of the United States for the District of Columbia; and at least ten days prior to the time of trial all of the heirs at law or next of kin of the decedent, or both together, as the case may require, and all persons claiming under the will in question, or any other instrument on file purporting to be a will of the decedent, shall be each served with a copy of said issues and a notification of the time and place of the trial thereof. If any one of them be an infant or of unsound mind he shall have a guardian ad litem appointed for him by the court before such trial shall proceed. If, as to any party in interest, the notification shall be returned "not to be found," the court shall assign a new day for such trial, and shall order publication, at least twice a week for a period of not less than four weeks, of the substance of the issues and of the date fixed for the trial thereof in some newspaper of general circulation in the District, and may order such further publication as the case may require. And the District Court of the United States for the District of Columbia may from time to time prescribe and revise rules and reg-

ulations for service personally upon such party outside of the District of Columbia of a copy of such issues and notification. Personal service on absent parties shall not be essential to the jurisdiction of the court. The proceeding for impaneling a jury for the trial of said issues shall be the same as if they were being tried in the Circuit Court. In all cases in which such issues shall be tried the verdict of the jury and the judgment of the court thereupon shall, subject to proceedings in error and to such revision as the common law provides, be res judicata as to all persons; nor shall the validity of such judgment be impeached or examined collaterally.

The Organic Act Creating the Court of Appeals of the District of Columbia is the Act of February 9, 1893, c. 74, 27 Stat. 434:

"Sec. 1. That there shall be, and there is hereby, established in the District of Columbia a court, to be known as the Court of Appeals of the District of Columbia, which shall consist of one chief justice and two associate justices, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold office during good behavior.

* * * * * * * * *

Sec. 6. That the said court of appeals shall establish a term of the court during each and every month of the year excepting the months of July and August, and it shall make such rules and regulations as may be necessary and proper for the transaction of the business to be brought before it, and for the time and method of the entry of appeals and for giving notices of appeals thereto from the supreme court of the District of Columbia, and such other rules and regulations as may be necessary and proper in the premises. If any member of the court shall be absent on account of illness or other cause during the session thereof, or shall be disqualified from hearing and determining any particular cause by having been of counsel

therein, or by having as a justice of the supreme court of the District of Columbia previously passed upon the merits thereof, or if for any other reason whatever it shall be impracticable to obtain a full court of three justices, the member or members of the court who shall be present shall designate the justice or justices of the supreme court of the District of Columbia to temporarily fill the vacancy or vacancies so created, and the justice or justices so designated shall sit in said court of appeals and perform the duties of a member thereof while such vacancy or vacancies shall exist: Provided, That no justice of the supreme court of the District of Columbia shall, while on the bench of said court of appeals, sit in review of any judgment, decree, or order which he shall have himself entered or made.

* * * * * * * * *

The above basic Act was amended in 1934 to change the court's name to the United States Court of Appeals for the District of Columbia (48 Stat. 926, ch. 426), and additional judges were added, two in 1930 (46 Stat. 785, ch. 538), and two in 1938 (52 Stat. 584, ch. 290).

The Act of February 9, 1893, as amended, is incorporated in the Code of the District of Columbia (1940 Edition) as Title 11, Chapter 2:

Sec. 11-201. Constitution.

The United States Court of Appeals of said District shall continue as at present organized, and shall consist of one chief justice and five associate justices, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold office during good behavior.

* * * * * * * * *

Sec. 11-205. Terms and rules.

The said United States Court of Appeals for the District of Columbia shall establish by rule of court such terms of the court in each year as to it may seem necessary; *Provided, however,* That

there shall be at least three terms in each year; and it shall make such rules and regulations as may be necessary and proper for the transaction of its business and the taking of appeals to said court. And said United States Court of Appeals for the District of Columbia shall have the power to prescribe what part or parts of the proceedings in the court below shall constitute the record on appeal, except as herein otherwise provided, and the forms of bills of exceptions, and to require that the original papers be sent to it instead of copies thereof, and generally to regulate all matters relating to appeals, whether in the court below or in said United States Court of Appeals for the District of Columbia. If any member of the court shall be absent on account of illness or other cause during the session thereof, or shall be disqualified from hearing and determining any particular cause by having been of counsel therein, or by having as a justice of the District Court of the United States for the District of Columbia previously passed upon the merits thereof, or if for any reason whatever it shall be impracticable to obtain a full court of three justices, the member or members of the court who shall be present shall designate a justice or justices of the District Court of the United States for the District of Columbia to temporarily fill the vacancy or vacancies so created, and the justice or justices so designated shall sit in said United States Court of Appeals for the District of Columbia and perform the duties of a member thereof while such vacancy or vacancies shall exist: *Provided,* That no justice of the District Court of the United States for the District of Columbia shall, while on the bench of said Court of Appeals, sit in review of any judgment, decree, or order which he shall have himself entered or made: *Provided also,* That if the parties to any cause shall so stipulate in writing, by their attorneys and solicitors, such cause may be heard and determined by two justices of the court without calling in any of

the justices of the District Court of the United States for the District of Columbia: *And provided also,* That all motions to dismiss appeals and other motions may be heard by two justices in the event of the absence or disqualification of any one of the justices as aforesaid: *And provided further,* That if in any cause heard before two justices as aforesaid the court shall be divided in its opinion, the judgment or decree of the lower court shall stand affirmed.

Judicial Code, Section 117.

There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established.

Judicial Code, Section 120.

The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits. In case the Chief Justice or an associate justice of the Supreme Court shall attend at any session of the circuit court of appeals, he shall preside. In the absence of such Chief Justice, or associate justice, the circuit judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignments shall be designated by the court. No judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals.